



¶1 In 2004, appellant Byron Mims pled guilty to attempted possession of a narcotic drug for sale. The trial court suspended imposition of sentence and placed him on probation. One of the conditions of Mims's probation forbade him to possess or control ammunition for a firearm. Mims now appeals from the trial court's finding that he violated that condition, claiming the state presented insufficient evidence to support the finding. We affirm.

### **Facts and Procedural Background**

¶2 On June 10, 2007, Tucson police officers responded to a call alleging that persons had been threatened with a gun in the common area of an apartment complex. When the officers arrived, four male suspects fled. The officers eventually detained all four, including Mims, and searched the area for weapons but found none. The officers spoke with a witness at the scene who identified Mims as one of the individuals involved and stated he had been holding a handgun.

¶3 Officers then obtained a warrant to search Mims's home. In a storage area, they found a cardboard box containing a "small case" of bullets. In a bedroom, they found a single round. The single round was in a box that also contained keys, a wallet, and other personal items. Mims's cousin Regina later testified that both boxes and the ammunition they contained were hers. Because she had moved the boxes in a hurry, she testified, she had not checked the contents before leaving them at Mims's house.

¶4 In June and July 2007, the trial court conducted probation violation and disposition hearings. At the violation hearing, the court admitted an officer's summary of one witness's oral statements that Mims had displayed a handgun although Mims objected

that those statements constituted unreliable hearsay. At the disposition hearing, after requesting and receiving additional briefing by the parties, the court found, by a preponderance of the evidence, that Mims had violated the conditions of his probation by possessing ammunition. It ordered Mims to remain in the Pima County jail for a maximum of ten days and then to be placed in a halfway house for six months. Mims appeals from that decision.

### **Discussion**

¶5 Mims claims the state presented insufficient evidence to show that he had violated his probation conditions by possessing ammunition. A violation of probation must be established by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). We will uphold a trial court's finding that a violation has occurred unless it is arbitrary or wholly unsupported by any theory of evidence. *State v. Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d 113, 114 (App. 1999).

¶6 Citing several Arizona cases, Mims maintains the state could not show that he constructively possessed the ammunition without some proof that he had both actual knowledge of it and dominion or control of the place where it was found. *See State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987), *citing State v. Hunt*, 91 Ariz. 149, 153, 370 P.2d 642, 645 (1962) (describing elements of constructive possession). He asserts that his mere residence in the premises did not demonstrate that he had actual knowledge of the ammunition's presence or control over it. *See State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976) (mere presence where contraband found insufficient to establish knowing possession or dominion and control).

¶7 Although Mims correctly states the relevant legal standards for possession or control, we disagree that the state presented insufficient evidence to demonstrate by a preponderance of the evidence that he possessed or controlled the ammunition. At the violation hearing, the trial court heard evidence that officers had found ammunition in two locations on the premises of Mims's small apartment, including within its only bedroom. Mims emphasizes that he was not the only resident of the apartment, that he shared it with his brothers, and that his cousin testified the ammunition belonged to her. But Mims's probation officer testified that Mims was on probation at the time and had signed conditions of probation informing him that possession of firearms or ammunition was a violation of probation. Because a violation of probation exposed him to nearly nine years in prison, the trial court was entitled to infer both that Mims would have been more vigilant about the contents of his small residence than a tenant who was not on probation and would not have passively tolerated the presence of ammunition unless it belonged to him. Moreover, the court was not required to credit the cousin's testimony.<sup>1</sup> See *State v. Hunt*, 13 Ariz. App. 267, 270, 475 P.2d 752, 755 (1970).

¶8 Nor does our reasoning in *Miramon* compel a different result. In that case, we found that a defendant's mere occupancy of a car seat, from under which illegal drugs protruded, was insufficient evidence of possession. 27 Ariz. App. at 453, 555 P.2d at 1141. But there we assessed whether the relevant evidence cleared a substantially higher legal

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<sup>1</sup>Although we do not assess credibility, the record suggests a reasonable fact-finder might question the veracity of Mims's cousin's claim. When questioned on direct examination, she did not know what type of weapon would use the ammunition that she claimed belonged to her.

threshold—namely, whether it showed beyond a reasonable doubt that the defendant was in possession of marijuana found under the passenger seat. *Id.* at 452, 555 P.2d at 1140. Evidence that is insufficient to prove an element of an offense beyond a reasonable doubt might well establish that same element by a preponderance of the evidence, the relevant legal standard here. *See* Ariz. R. Crim. P. 27.7(b)(3). And, the facts demonstrating dominion and control here are readily distinguishable from those in *Miramon*: Mims was a resident of the premises where the contraband was found, but *Miramon* was neither the car’s owner nor its driver. For that reason, Mims’s control over the contents of his residence was presumptively greater than that exercised by *Miramon* over the contents of a car in which he was a passenger.

¶9 Mims also observes that the state’s evidence included the hearsay statements of an eyewitness who maintained that Mims had been brandishing a handgun in the common area of the apartment complex. At a probation violation hearing, the court may receive any reliable evidence, including hearsay. Ariz. R. Crim. P. 27.8(b)(3). Accordingly, a trial court does not err in considering hearsay if “the circumstances are such as to afford a reasonable assurance of [its] truthfulness . . . and the circumstances warrant its use.” *State v. Brown*, 23 Ariz. App. 225, 231, 532 P.2d 167, 173, *aff’d*, 112 Ariz. 29, 536 P.2d 1047 (1975).

¶10 Here, the trial court allowed the hearsay evidence to be introduced over Mims’s objection that it was unreliable but assured Mims the court would “evaluate the credibility of [those] statements within the context of everything in the factual record.”<sup>2</sup> The court’s

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<sup>2</sup>When police officers arrived at the scene, they apprehended Mims quickly and found no weapons either on his person or in the path of his flight.

later request for further briefing on the question of constructive possession and its review of the evidence at the disposition hearing suggest the court ultimately gave the accusation that Mims possessed a handgun no weight as circumstantial evidence he possessed ammunition—a fact Mims acknowledges in his brief to this court.<sup>3</sup> Thus, to the extent Mims implies the trial court may have erred in receiving that hearsay evidence, any such error would be harmless.

### **Conclusion**

¶11 Ammunition was found in two places on the premises of the apartment where Mims resided, and the trial court could reasonably infer that, as a probationer, Mims would be especially vigilant about the contents of that residence. Those facts provided a sufficient basis for the court to find by a preponderance of the evidence that Mims was aware of the presence of the ammunition and exercised control over it.

¶12 Affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge

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<sup>3</sup>At the disposition hearing, the court summarized its view of the evidence to Mims: “I didn’t hear any evidence that you yourself had those bullets, that that ammunition had your fingerprints on it or that[—]it wasn’t certainly on your person per se, but it was in the house you were living in.”